to keep it separate and distinct from his other stocks.[15] If converted, subsequently acquired stock of like kind cannot be held to belong to the customer in the absence of an express declaration by the broker to that effect. The adoption of the rule applied in *In re Brown & Co.* will necessitate its application to every wrongful taking of goods, and will create a new and dangerous exception to the maxim, that, as between all creditors equality is equity.

STATUTE OF LIMITATIONS AND FORECLOSURE OF MORTGAGES.—Although the general principle is well established that any act on the part of a mortgagor which extends the statute of limitations as to the note secured likewise extends the statute as to the mortgage, provided the mortgagor has retained the property unencumbered,[1] a more difficult question is the extension of the statute in cases wherein third parties have acquired rights in the mortgaged property. The courts have agreed on a few general propositions: that the grantee has the right to plead the statute;[2] that the grantee of a mortgagor takes the land subject to the mortgage as it was then extended;[3] and, except in a few states,[4] that the right to foreclose is an action *in personam*,[5] and not *in rem;* but further than this the courts have reached widely different results.

Some jurisdictions have adopted the principle that after third parties have acquired rights in the mortgaged premises, the mortgagor has no further power to affect in any way the extent of the lien with which the land is burdened.[6] In support of this rule, the courts have advanced two theories: first, that after conveyance by the mortgagor the land is chargeable purely as surety for the debt,[7] and consequently beyond the control of the debtor; and, secondly, that upon conveyance a separate and distinct cause of action arises against the grantee,[8] which is therefore uninfluenced by the acts of the original mortgagor. In the jurisdictions which have adopted this reasoning neither the absence of the mortgagor from the state,[9] nor part payments by him on the original debt,[10] will in any way affect the running of the statute as to a prior grantee. In connection with this rule, the limitation has been generally adopted that the mortgagee must be given either actual or constructive notice[11] of the intervention of the rights of the grantee, or the latter will be bound by the acts of the mortgagor. The practical argument in favor of this view is admittedly

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[15]Dos Passos, Stock Brokers and Stock Exchanges 287.

[1]Wood, Limitations (3rd ed.) §230.

[2]Corbey *v.* Rogers (1898) 152 Ind. 169.

[3]Carson *v.* Cochran (1892) 52 Minn. 67; Palmer *v.* Butler (1873) 36 Ia. 576; Lent *v.* Morrill (1864) 25 Cal. 492.

[4]Anderson *v.* Baxter (1871) 4 Ore. 105; Peters *v.* Dunnells (1877) 5 Neb. 460.

[5]Whalley *v.* Eldridge (1877) 24 Minn. 358.

[6]Cooke *v.* Union Trust Co. (1899) 106 Ky. 803; DeVoe *v.* Rundle (1903) 33 Wash. 604.

[7]Wood *v.* Goodfellow (1872) 43 Cal. 185.

[8]Colonial & U. S. Mortgage Co. *v.* N. W. Thresher Co. (1905) 14 N. D. 147; Arthur *v.* Serevne (1893) 39 S. C. 77.

[9]George *v.* Butler (1901) 26 Wash. 456; Bush *v.* White (1884) 85 Mo. 339.

[10]Tate *v.* Hawkins (1884) 81 Ky. 577; California Bank *v.* Brooks (1899) 126 Cal. 198.

[11]Denny *v.* Palmer (1901) 26 Wash. 469; Filipino *v.* Trobock (1901) 134 Cal. 441; Hibernia etc. Society *v.* Farnham (1908) 153 Cal. 578; Paine *v.* Dodds (1905) 14 N. D. 189.

strong. It enables the grantee to know with certainty the extent of the lien which encumbers his property;[12] it does not interfere with foreclosure by the mortgagee during the normal statutory period, irrespective of the whereabouts of the mortgagor;[13] and it prevents the mortgagor from imposing burdens on property which he no longer owns.[14] In a recent Utah case, *Boucofski* v. *Jacobsen* (1909) 104 Pac. 117, these arguments prevailed and the court adopted the rule heretofore presented.

An equal number of jurisdictions have, however, refused to approve the legal reasoning underlying these decisions. In states in which the mortgage is held to transfer the fee, the reasoning is clear that the grantee succeeds only to the rights of the mortgagor.[15] Other courts base their view upon the general principle that the mortgage is purely a lien on the land for the security of the debt, and consequently is, in nature, largely incidental to the debt.[16] That this is recognized even by the courts adhering to the rule above is apparent from the general view that any act by the mortgagor keeping alive the debt, also keeps alive the mortgage as to his interest in the property,[17] even though third parties have acquired subsequent liens or other interests. And in a few jurisdictions this theory of the incidental nature of the mortgage has been carried to the extent of holding that a bar of the note by the statute is itself a bar to the mortgage.[18] Although the grantee becomes a necessary party to the foreclosure action, since he himself has violated no legal duty towards the mortgagor, it would appear to be the correct view that the conveyance of the property by the mortgagor does not create a new right of action.[19] Further, it is asserted that the grantee has taken the land burdened by the debt of his grantor, and consequently any act which suspends the bar of the statute as to the mortgagor must also operate to suspend the statute as to the grantee.[20] In the states approving this reasoning, absence of the mortgagor from the state, part payments, or other acts which keep the debt alive also prevent the grantee from asserting the statute as a bar to the mortgage.[21] This rule has, however, been subjected to the general limitation that if the mortgage is barred at the time of the conveyance, a subsequent revival of the debt will not affect the mortgage;[22] and this result appears justifiable on general equitable principles. In addition to the legal reasons in support of this second view, there are likewise many practical arguments. Since the grantee takes subject to the mortgage, it is no hardship upon him that the land be liable for the debt with which it

[12]Colonial & U. S. Mortgage Co. *v.* N. W. Thresher Co. *supra.*

[13]Blumberg *v.* Burch (1893) 99 Cal. 416; Bush *v.* White *supra.*

[14]Zoll *v.* Carnahan (1884) 83 Mo. 35; Lord *v.* Morris (1861) 18 Cal. 482.

[15]Medley *v.* Elliott (1872) 62 Ill. 532.

[16]Eborn *v.* Cannon's Admin. (1869) 32 Tex. 231; Brown *v.* Rockhold (1877) 49 Ia. 282; Murray *v.* Emery (1900) 187 Ill. 408.

[17]Colonial & U. S. Mortgage Co. *v.* Flemington (1905)14 N. D. 181; Brandenstein *v.* Johnson (1903) 140 Cal. 29.

[18]McCarty *v.* White (1863) 21 Cal. 495; Kulp *v.* Kulp (1893) 51 Kan. 341.

[19]Richey *v.* Sinclair (1897) 167 Ill. 184; Schmucker *v.* Sibert (1877) 18 Kan. 104; Ewell *v.* Daggs (1882) 108 U. S. 142.

[20]Waterson *v.* Kirkwood (1876) 17 Kan. 9; Falwell v. Hening (1890) 78 Tex. 278; Ordway *v.* Cowles (1891) 45 Kan. 447.

[21]Kendall *v.* Tracy (1892) 64 Vt. 522; Hughes *v.* Edwards (1824) 9 Wheat. 489; Murray *v.* Emery (1900) 187 Ill. 408; First Nat. Bank *v.* Woodman (1895) 93 Ia. 668.

[22]Levy *v.* Williams (1899) 20 Tex. Civ. App. 651; Cooke *v.* Prindle (1896) 97 Ia. 464.

was burdened, until the mortgage would have been barred as against the mortgagor.[23] Further, it prevents the mortgagee's uncertainty which necessarily results from his duty under the former rule to search the records for a conveyance of the mortgaged property, for under such a rule his rights to foreclose may depend altogether on the constructive notice afforded by recording.[24]

The situation in New York is peculiar. The Court of Appeals has asserted the second rule in at least three decisions;[25] where the point, however, was not squarely in issue. The Appellate Division, meanwhile, has evinced a pronounced tendency towards the other view.[26] It is probable, however, that the Court of Appeals will follow the sounder legal principle, rather than the arguments of expediency advanced, and consequently sustain the view heretofore expressed.

DEFENSE OF PROPERTY BY MECHANICAL APPLIANCES.—The common law right to resort to violence in defense of property is limited by the principle that the force used must not outrun the provocation.[1] A threatened trespass on land may be resisted with commensurate force,[2] but not to the taking of life.[3] Accordingly the protection of land by deadly appliances, such as spring-guns, is not permissible.[4] The right to use extreme violence in defending the dwelling is more doubtful. The householder may kill an invader if killing is apparently necessary to avert a felony of violence.[5] Whether killing is permissible solely to prevent a felonious taking of property, depends on the theory adopted to explain the owner's right. On one theory, he is entitled to kill in order to protect property as such,[6] and he may shoot down a burglar because his goods would otherwise be stolen. On the other, he may kill only to avert a crime of violence which may endanger human life. In defending his goods against a burglar by a less violent mode, as he may lawfully do, he incurs great personal risk; this peril justifies him in taking the burglar's life to save his own. Hence the law does not compel him to undergo this peril, but allows him to kill instanter.[7] This doctrine is submitted as that of the common law, and seemingly explains the distinction made by writers between felonies attended with

[23]Kerndt Bros. *v.* Porterfield (1881) 56 Ia. 412; Clinton Co. *v.* Cox (1873) 37 Ia. 570.

[24]See cases under 11 *supra.*

[25]N. Y. Life Ins. etc. Co. *v.* Covert (N. Y. 1819) 6 Abb. Pr. Rep. (N. S.) 154; Murdock *v.* Waterman (1895) 145 N. Y. 55; Mark *v.* Anderson (1900) 165 N. Y. 529.

[26]Fowler *v.* Wood (N. Y. 1894) 78 Hun 304; Simonson *v.* Nafis (N. Y. 1899) 36 App. Div. 473.

[1]Pollock, Torts (5th ed.) 165.

[2]Weaver *v.* Bush (1798) 8 T. R. 78.

[3]State *v.* Vance (1864) 17 Ia. 138.

[4]Bird *v.* Holbrook (1828) 4 Bing. 628; Hooker *v.* Miller (1873) 37 Ia. 613; 7 & 8 Geo. IV. c. 18. In Ilott *v.* Wilkes (1820) 3 B. & Ald. 304, redress was denied on the ground that the plaintiff, having notice of the condition of the defendant's premises, had by trespassing assumed the risk of injury.

[5]State *v.* Patterson (1872) 45 Vt. 308; Thompson *v.* State (1901) 61 Neb. 210. Many courts adopt in substance Foster's definition of justifiable self-defense, that one may repel force by force, to the taking of life if need be, in defense of person, habitation or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony on either; Foster, Crown Law 273; Pond *v.* People (1860) 8 Mich. 150; and this definition has been substantially embodied in several State codes. People *v.* Flanagan (1881) 60 Cal. 2; McPherson *v.* State (1857) 22 Ga. 478.

[6]Lilley *v.* State (1885) 20 Tex. App. 1.

[7]See People *v.* Payne (1857) 8 Cal. 341.